

No. 15823

United States
Court of Appeals
for the Ninth Circuit

*See also
Vol. 308*

ERIC SOBY, Doing Business as Soby Painting
Co., et al.,

Appellants,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY,
etc.,

Appellees.

Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED

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Appeal from the District Court
for the District of Alaska,
Third Division

In the District Court for the District of Alaska,
Third Division

No. A-10,628

UNITED STATES OF AMERICA on the Relation
of and for the Use of ERIC SOBY, d/b/a
SOBY PAINTING CO.,

Plaintiff,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY,
Individually and as Co-partners d/b/a
KUNEY-JOHNSON COMPANY; UNITED
PACIFIC INSURANCE COMPANY OF
AMERICA, Seattle; PACIFIC INDEMNITY
COMPANY, Los Angeles; AMERICAN RE-
INSURANCE CORPORATION of New York;
and TRINITY UNIVERSAL INSURANCE
of Dallas, Texas,

Defendants,

and

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Additional Defendant.

SUPPLEMENTAL TRANSCRIPT
OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr.,
U. S. District Judge.

October 11, 1956

Appearances:

For the Plaintiff:

EDWARD L. ARNELL.

For the Defendants:

LEE OLWELL and

PAUL R. CRESSMAN.

PROCEEDINGS

EDWARD COLLINS

called as a witness for and on behalf of the defendants, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Olwell:

Q. Will you state your name, please?

A. Edward Collins, C-o-l-l-i-n-s.

Q. And your address, Mr. Collins?

A. 1435 Springdale Place, Seattle, Washington.

Q. And what are you commonly called as a nickname?
A. Bud.

Q. Mr. Collins, what is your present occupation?

A. I work for the Kuney-Johnson Company.

Q. And how long have you worked for Kuney-Johnson?
A. Nine years this month.

Q. And in what capacity have you worked for—
A. As an estimator.

Q. Pardon?
A. As an estimator.

Q. And have you maintained that same job throughout your work with Kuney-Johnson?

(Testimony of Edward Collins.)

A. Yes.

Q. Now, Mr. Collins, when did you first come to Alaska on any [647-2*] business for Kuney-Johnson?

A. It was in January of 1952. Mr. Johnson and I came up for about two days to Fairbanks.

Q. And when did you have any occasion first to come to Alaska in connection with the Ladd and Eielson jobs? A. In April of 1953.

Q. Now, prior to that time I will ask you had you had anything to do with the estimating of the job or the purchasing or ordering of materials?

A. Yes, I did.

Q. What had you to do with it?

A. I estimated the job; purchased most of the materials.

Q. Now, will you just tell us, please, what you do in estimating a job of this type? What you did in estimating this job?

A. Well, we received the plans from the Corps of Engineers and we take off the quantities that are involved in constructing the building. We give prices on those quantities, prepare an estimate and submit our bid.

Q. Then after the bid is submitted what do you do? A. If we are the——

Q. After the bid is accepted? I will correct that.

A. If we are the successful contractor, then we take the job and go into more detail and try to be as accurate as we possibly can.

(Testimony of Edward Collins.)

Q. And do you then supply the material prices? [647-3] A. Yes. we do.

Q. Now, let's refer specifically to the lumber in Contracts 384 and 385, Mr. Collins. Did you follow the procedure you have outlined in connection with the lumber? A. Yes, sir.

Q. And when you first take the lumber figures off the plans, in what detail did you break them down?

Mr. Arnell: If your Honor please, this is perhaps foundation in nature, but I think it's all immaterial.

The Court: What is the purpose of it, Mr. Olwell?

Mr. Olwell: If it please the Court, it would be correct for me to say it's preliminary and the purpose is this: That I intend to show through this witness how this lumber was ordered, what kind of lumber it was, and the detail with which the lumber was specified. I do not intend to be at length with it, but I thought I would furnish the Court with that.

Mr. Arnell: I would state a further objection and that would be upon the ground that the defendants' own records are here. They are the best evidence and I think they specify what was done and what was ordered.

The Court: Excepting this, counsel, they are not limited to their records.

Mr. Arnell: Well, I think, your Honor, that they

(Testimony of Edward Collins.)

have not, through this witness, impeached their own records.

The Court: I don't think that they intend to do that. [647-4]

Mr. Olwell: That is right, your Honor.

The Court: Objection will have to be overruled for the reason that counsel for the plaintiff in their pleadings have alleged that the defendants did not use the proper materials and certainly they made a big issue of the question of lumber. Objection is overruled. You may answer.

Mr. Olwell: Thank you, your Honor.

Q. (By Mr. Olwell): The question, Mr. Collins, to shorten the matter, is in what detail did you take off the lumber as required on this job?

A. Prior to bidding or after we were the contractor?

Q. Both.

A. Prior to bidding we would take it off as closely as we can from the time that we are allowed and list it into various categories, as far as studs, joists, sheeting, etc., and then we would call up our wholesale lumber people and say that we would like a price of so many thousand feet of 2x4s and 2x10s and so forth, strapped and delivered to the dock. Then they would call us back and give us the prices. After we have the job, then we take it off to greater detail and get it exactly to our best ability.

Q. Now then, going along, Mr. Collins. After the bid was accepted and you had done what you

(Testimony of Edward Collins.)

have just testified to, did you have anything to do with the order for the lumber in this case? [647-5]

A. Yes.

Mr. Olwell: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you what has been admitted in evidence as Plaintiff's Exhibit 6, and the first several documents of which appear to be purchase orders. I would like you to glance at those briefly and tell me, did you prepare those purchase orders? A. Yes, I did.

Q. Now, the purchase orders called for precision cut, I think the phrase is used on there, precision cut pre-nailed.

A. Pre-nailing is not on here. It's nailing of headers, the cripples, corners, and partition studs.

Q. Just tell us what is meant by these phrases, nailing of certain things and precision cut?

A. Precision cutting means to take the piece of wood that we will use, whether it be a stud or other member, and cut it at each end at the same time with a gang saw, they call it. That will give you an exact length of the piece of material to the fraction of an inch.

Q. I will ask you whether or not all of this lumber for the—all the framing lumber, at least, ordered as shown on the purchase orders in Plaintiff's Exhibit 6, was or was not precision cut? [647-6]

A. All the lumber was not precision cut.

Q. How much of it was?

(Testimony of Edward Collins.)

A. I don't know.

Q. Well, in what categories was it precision cut?

A. The joists were not precision cut.

Q. Was there anything else that you recall from memory that was precision cut?

A. The headers, the cripples.

Q. What is a cripple, Mr. Collins?

A. A cripple is a piece of wood beside an opening, whether it be a door or window and it's smaller than the adjacent stud and you put the stud and then the cripple right next to each other. The cripple supports the——

Q. Were any of those pieces of lumber nailed at the mill? A. Yes.

Q. Which ones?

A. The headers, the cripples, and the corner studs and partition corner studs were nailed at the mill.

Q. Mr. Collins, prior to ordering any materials, including lumber, I will ask you whether or not you were familiar with the specifications on this job or these jobs? A. Yes, sir.

Q. Why is there no reference on the purchase order for the lumber as to moisture content?

Mr. Arnell: I object to that question upon the ground [647-7] it calls for a conclusion of the witness, and, further, it is immaterial. The order speaks for itself.

The Court: Will you read the question back, please?

(Thereupon, the Reporter read question Line 25, Page 647-7.)

(Testimony of Edward Collins.)

The Court: Well, that is presupposing the witness knows. Do you know, Mr. Collins?

A. Yes.

The Court: Objection will be overruled. You may answer.

Q. (By Mr. Olwell): You may answer it, Mr. Collins.

A. From the experience we have had with previous construction in Alaska and from what I have been told of the climatic conditions of the town of Fairbanks, that and the intent of the specifications, there'd be no reason to believe that lumber would not be 19 when it arrived at the jobsite.

Mr. Arnell: If your Honor please, I renew my objection and upon the ground—based on hearsay and not personal knowledge of the witness.

The Court: Objection sustained. You may rephrase the question, Mr. Olwell.

Mr. Olwell: May it please the Court, I did not have an opportunity to express myself on counsel's objection. That is certainly not hearsay. It was not offered for the proof or for the purpose of showing the accuracy or proving the truth of what [647-8] was told to him. This witness prepared a purchase order and I inquired of him why he did not include something on the purchase order in this case. He has answered the question why he did not. That was not offered to show that the facts upon which he arrived were true, and, therefore, hearsay is not involved. I think it's perfectly competent testimony. The witness merely stated why he did something or

(Testimony of Edward Collins.)

did not do something. Now, that does not involve hearsay. I am not trying to prove through this witness that the facts that he was told were true or not or if his understanding was true. I am merely showing, as he has testified, why he did or did not do something and I think it's perfectly competent and does not involve hearsay.

The Court: Mr. Arnell.

Mr. Arnell: If your Honor please, first I'd like to have the answer read back before I make my statement, if I may.

(Thereupon, the Reporter read Answer Line 12, Page 647-8.)

Mr. Arnell: If your Honor please, he has expressly said that based upon what he had been told and based upon his experience and what he assumed the specifications to be. Now, certainly, your Honor, he is drawing conclusions. He is basing those conclusions upon what somebody else has told him, and, therefore, I say that the answer should be stricken for the reasons stated. I again state that the witness has not been qualified as an expert to offer such opinions and I think the answer should be stricken. [647-9]

The Court: Well, counsel, Mr. Arnell, I point out to you Mr. Olwell states that he isn't eliciting this testimony from this witness for the purpose of proving the statements he made, only the reasons why he didn't order any moisture content.

Mr. Arnell: If your Honor please, that is the

(Testimony of Edward Collins.)

very essence of our objection. The specifications say that the lumber shall not exceed 19 per cent at the point of shipment and this witness is offered to testify through not only his own personal knowledge but what he assumes, what other people have told him that it wasn't necessary to specify it. Now, I submit, your Honor, that certainly is not the proper offer of proof.

The Court: Well, the court will have to reverse its position and the objection will be overruled with the understanding that it's not made for the purpose of veracity of the statement but for the reason why such was done.

Q. (By Mr. Olwell): Will you state whether or not those were the facts which you relied on or which were in your mind at the time you made out this purchase order for the lumber?

Mr. Arnell: If your Honor please, may the record, for the purpose of brevity, show that I have a continuing objection to this line of testimony?

The Court: Well, if you make an objection to this last question the court will sustain it because counsel said "were those the facts." Now, you reversed your position. [647-10]

Mr. Olwell: I will rephrase it, your Honor.

The Court: And then you may have a continuing objection to this line of questioning.

Mr. Arnell: Except as to form.

The Court: Yes.

Q. (By Mr. Olwell): Mr. Collins, rephrasing the last question. Will you state whether or not

(Testimony of Edward Collins.)

those were the factors upon which you made out that purchase order for lumber shown in Plaintiff's Exhibit 6? A. Yes, sir.

Mr. Arnell: I object to that upon the ground it's a leading question, suggestive.

Mr. Olwell: If the court please, I don't think it was leading and I was trying to clear this up. I am now through with the subject but I do not think it was a leading question. It was merely to state whether or not those were the factors that he relied upon. I think the witness so testified but as the court reporter read the answer back there was some question in my mind as to whether it was definite enough to be in the record as it should be.

The Court: Mr. Arnell, this question was not opening up a new subject but was clarification of the prior subject, and, therefore, objection will be overruled. [647-11]

Q. (By Mr. Olwell): Now, Mr. Collins, you stated you got up to Alaska some time in April of 1953. What was the status of the progress of construction on the job at Ladd when you got there, if you remember?

A. We were about ready to pour our first basement slab.

Q. And do you know whether or not any lumber had arrived?

A. Some lumber had arrived, yes.

Q. Did you thereafter leave Ladd or did you stay for an extended period of time?

A. I was between Ladd and Eielson until the

(Testimony of Edward Collins.)

first part of October. I went to Seattle for a couple of days then I came back.

The Court: Pardon me, counsel. Could I inquire as to what date he arrived? The only information I have so far is he arrived in April. Is that not true?

Mr. Olwell: Yes, your Honor.

A. I don't recall the date. It was after the first shipment of lumber arrived on the job. I don't recall the date.

The Court: Well, was it the first part of April or latter part of April?

A. Latter part of April.

The Court: Thank you.

Q. (By Mr. Olwell): Now, you stated, I think, that you came down to Seattle for a couple of days in October. Did you then return to [647-12] Fairbanks? A. Yes.

Q. And how long did you remain throughout the job?

A. I remained in the Fairbanks area until January of '54.

Q. And then where did you go?

A. Then I went back to Seattle.

Q. Did you come back on the job then?

A. No, sir.

Q. All right. Now, going back to this period commencing with the time of your arrival, Mr. Collins, where was the lumber placed in respect to the job?

A. The lumber was between the field office and—I don't recall the number of the building—but it

(Testimony of Edward Collins.)

would have been the second building. We had a large open area that was to eventually be a parking area and that is where the lumber was first stored.

Q. Then how was it stored, Mr. Collins?

A. It was received from the cars and piled in piles of what we would use first. The studs were piled together and the joists were piled together and the sheeting and various other items and we laid it out systematic so we could easily get it from the piles.

Q. Now, there has been reference in prior testimony to a framing yard? A. Yes.

Q. Did Kuney-Johnson have a framing yard there? [647-13] A. Yes.

Q. What is a framing yard?

A. Our framing yard on this particular job was where we took the piles, the lumber from the various piles and nailed them into partitions; the size of which we could easily lift with a crane and drop into position of the building.

Q. Were those solely interior partitions?

A. No; some were exterior partitions, too.

Q. Let's take the first building, Mr. Collins, and as rapidly as you can just tell us the progress of how that building would be put up, what did you do first and then next and so forth?

A. First of all, we poured the concrete slab. Then we built up the concrete exterior walls. Then we put the joists down and then we used plywood sheeting for the deck. Then we would take the sections that were made up in our framing yard, lay

(Testimony of Edward Collins.)

them down on the deck, nail the outside wall sheeting to that, lift them up, then we would lift the interior partitions over them, stand them up, secure them, fill in with any piece of material that was needed so—that which we couldn't actually do in a framing yard—then we would put the second floor joist on, second floor sheeting in the same procedure up until into the roof.

Q. Now, with respect to the other buildings in the project. I am now speaking of Ladd. Let me ask you whether or not the [647-14] process of construction followed the same general construction as you have described in Building No. 1?

A. Yes; we would have joist crews, sheeting crews, exterior wall crews, interior wall crews, and they would move on to the next buildings.

Q. Would one building be completed before you had started on the next? A. No, sir.

Q. Well, how was that handled, Mr. Collins?

A. The joist crews for the first building, first floor joists, they would lay those then they would move on to the second building. Behind them would follow the sheeting crew and then the partitions. Possibly one building would have the partitions all up and the next building would have just the first floor joists on and so on down the line.

Q. Now, Mr. Collins, were you at Ladd at the time the sheetrock was applied by Story Brothers?

A. Yes.

Q. Did any of the inspectors, Government men, complain to you personally at any time concerning

(Testimony of Edward Collins.)

the sheetrock? A. No, sir.

Q. Did you have any complaint—now I am speaking of yourself personally—did you have any complaint from either Minor Bottorff or anyone in his employ concerning the sheetrock?

Mr. Arnell: If your Honor please, I object to that [647-15] question upon the ground it's leading.

Mr. Olwell: May it please the court—

The Court: Objection is overruled.

Q. (By Mr. Olwell): Did you have any complaint from Minor Bottorff? A. No.

Q. Did you observe the sheetrock while it was on the job? A. Yes.

Q. Where was it stacked or piled?

A. It was stacked in relatively close to the lumber pile. It was between the field office and the, I believe it was the second building.

Q. Did you observe its condition as piled?

A. Yes.

Q. Just what was it?

A. It was piled possibly 16 to 20 feet high and it had tarpaulins over it.

Q. Was any of it damaged? A. Yes.

Q. Did you have anything to do with ordering the—any replacement sheetrock?

A. I wrote the order, yes.

Q. Do you recall, Mr. Collins, when you first ordered any replacement sheetrock?

A. No; I don't. [647-16]

Q. Do you recall when you ordered in respect

(Testimony of Edward Collins.)

to the time when the first shipment arrived and appeared to be damaged?

A. It could have been a month, but I don't remember.

Q. Now, do you know of your own knowledge whether any of the sheetrock was culled?

A. Yes, sir.

Q. How was that done, Mr. Collins?

A. When we were ready to put it in the buildings we would separate the pile as it was, put the bad pieces to one side, the pieces we would use to the other side, take those pieces and lift them into the buildings, into various apartments in each building.

Q. Would there be any later culling in the buildings?

A. Yes; there was later culling. Sometimes we may have gotten a piece in there that was not satisfactory to our superintendant and it would be thrown outside.

Q. Mr. Collins, do you know or have you had occasion to learn and figure from the plans how much of the sheetrock used in each building percentage-wise could be used in full 4x8 sheets?

A. I do know, yes.

Q. Approximately what percentage could be so used?

A. About 40 per cent could be, full 4x8 sheets.

Mr. Olwell: If the court please, may I approach—

The Court: You may. [647-17]

(Testimony of Edward Collins.)

Mr. Olwell: If your Honor please, I have two documents which I wish to mark as exhibits. One consists of two rather small sheets, 8x11, that we will have no problem with. The other consists of 13 pages of drawings which are rather awkward in size. Now, the small sheets contain a computation which is based on the drawings that are shown on the large sheets. The reason for this explanation is as to whether the court wishes two exhibits or one out of this.

The Court: Well, it would appear to the court that one exhibit would be proper. You could make two subdivisions thereof.

Mr. Olwell: If we could do that and if it would be possible—I am inquiring whether it could be stapled? There are a number of exhibits in this case which are not stapled and they are just liable to be all over.

The Court: Well, I suggest that if you staple them together, that is, the first division, namely, the drawings or schematic plan, I suppose is what you would call it, would be stapled together as one unit and the other as a separate unit.

Mr. Olwell: If we could do that and give it the same exhibit number it would not be necessary to give separate numbers to each sheet.

The Court: No. I would then admit that in evidence as Defendants' Exhibit for identification only as Q-1 and -2. The plans being one and the computation is two.

(Testimony of Edward Collins.)

Mr. Olwell: Now, by way of clarification of the plans—— [647-18]

Mr. Wilson: Wait until the witness testifies and identifies it.

Mr. Olwell: Your Honor, the witness can describe them better than I can and much more briefly.

The Court: Yes.

Mr. Olwell: 13 sheets.

The Court: How many yellow?

Mr. Olwell: One yellow and one white. May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you what has been marked for identification as Defendants Exhibit Q, division or part number 1, I would ask you merely to state what that is? I merely wish you to identify it.

A. This is the layout of each room showing the plasterboard and how it was used.

Q. You mean each room where?

A. In each apartment.

Q. And where?

A. At Ladd Air Force Base.

Q. And did you prepare this?

A. No, sir.

Q. Did you check it, however, after arriving up here? A. Yes; I checked it. [647-19]

Q. Is it accurately done? A. Yes, sir.

Q. Now, Mr. Collins, again for identification, handing you what has been admitted as Defendants

(Testimony of Edward Collins.)

Q, part two for identification, consisting of two sheets, will you merely identify that, please? Let's start with the sheet underneath first.

A. The sheet underneath is a summary of the square footage, full pieces, and the total pieces that were required in this project.

Q. Did you prepare sheet number two?

A. No; I did not prepare it.

Q. Did you check the figures on it?

A. Yes; I checked the figures.

Q. Have you made any pencilled notations on it?

A. Yes; I have.

Q. Now, turning to sheet one or the first sheet, the yellow sheet. What is that?

A. This is my recap in pencil of what I made the day before yesterday.

Q. And let me ask you whether or not the pencil notations on the white sheet are carried forth onto the yellow sheet recap? A. Yes, sir.

Mr. Olwell: May I show this to counsel, your Honor?

The Court: You may. [647-20]

Mr. Olwell: May I speak to counsel a moment, your Honor?

The Court: You may.

Mr. Arnell: May I inquire, your Honor?

The Court: You may.

Mr. Olwell: I will offer Defendants Q in evidence, your Honor, both parts.

The Court: Very well. Now you may inquire, Mr. Arnell.

(Testimony of Edward Collins.)

Q. (By Mr. Arnell): Mr. Collins, who prepared Defendants Exhibit Q-1, which are these (indicating) prints?

A. Fellow by the name of Gustafson.

Q. Who is he?

A. He's a fellow that works for Kuney-Johnson Company in Seattle.

Q. Is he still employed?

A. No; he's back at school now.

Q. When were these sheets prepared?

A. About three weeks ago.

Q. Did you personally assist in the preparation of these prints?

A. I was in the same room.

Q. Well, did you make the drawings?

A. No, sir.

Q. Did you check the drawings in each instance against the plans that were applicable to this job?

A. I did the day before yesterday, yes. [647-21]

Q. To what extent did you compare it?

A. I tried to find and have a record of the maximum number of full 4x8 sheets that could have been used on the project.

Q. Did you run another take-off based on the plans? A. Based on the plans, yes.

Q. Where is that take-off?

A. I either put a check mark beside his figure or I circled his figure and wrote in pencil to the right of the corrections that I made.

Q. Which figures did you accept that appear on Exhibit Q-2?

(Testimony of Edward Collins.)

A. The pencil figures. If there is no pencil correction, then the other figures are correct. If there is a correction in pencil, then the pencil figures are correct.

Q. Well, I note two columns here, Mr. Collins, where there are pencil check marks. A. Yes.

Q. Are those your marks? A. My marks.

Q. And what do those check marks indicate?

A. That I agree with his original.

The Court: That you originally agree with his figures?

A. That I agree with his figures, yes. [647-22]

Q. (By Mr. Arnell): At the bottom of those columns, Mr. Collins, I see pencil figures indicating different figures than those that appear on the print? A. Yes.

Q. And those pencil figures are yours?

A. Yes.

Q. And they represent your opinion as against his then as to what the figure should be?

A. Yes.

Mr. Arnell: If your Honor please, I would object to Defendants Exhibit Q-1 because they are prints that were made, as the witness testified, three weeks ago. There is no showing that they are identical with the plans which are an exhibit here and under which this contract had to be performed.

Mr. Orwell: May it please the court, does your Honor wish to hear from me?

The Court: Well, I was just going to inquire of

(Testimony of Edward Collins.)

that very fact of this witness. You may do so, if you wish.

Mr. Olwell: Either way.

The Court: You may proceed.

Q. (By Mr. Olwell): Mr. Collins, I think you stated in answer to Mr. Arnell's question that you prepared these plans? A. I am sorry.

Q. I think you stated in answer—you compared this with the [647-23] plans? A. Yes.

Q. By which—what do you mean by the plans?

A. The contract drawings.

Q. On what job? A. 384.

Q. And is it accurate in respect to the plans, contract drawing? A. Yes, sir.

Mr. Olwell: Now, if the court please, I have and the witness brought up with him from Seattle a duplicate copy of the plans. They are already in evidence here. I think it would burden the court to put them in evidence. I renew my offer. I think it's properly identified.

The Court: Mr. Collins, can you account for the difference between your figures and that of Mr. Gustafson?

A. Yes. On the first sheet or—no, beg your pardon. That was on the 12th sheet—in the kitchens. When he was doing this and laying it out and doing the drawing he asked Mr. Johnson of Kuney-Johnson Company, whether it could use full sheets in there and Mr. Johnson said he didn't think so. Consequently, he did not use or utilize the full sheet, but I took it that there could have been full

(Testimony of Edward Collins.)

sheets used in the kitchens, I think there are three of them, so I drew in the full sheets and corrected those and made more full sheets. [647-24]

The Court: Is that substantially the difference between your figures and that of Mr. Gustafson?

A. I think there was one or two other occasions where the number of pieces, not full sheets, but number of pieces were changed. We could have used —instead of having two pieces we could have used one piece, not a full sheet.

The Court: I see.

Mr. Arnell: Well, if your Honor please, I find nothing on any of these sheets to refer to Contract 384. I find no scale other than reference that the scale is one-quarter inch equals one foot, but there are no measurements and there is only one room diagrammed and the rest of these drawings, I presume, are measurements of standard sheets of sheet-rock.

The Court: Counsel, you could compare those with the original plans, as Mr. Orwell pointed out, to see whether or not they are in conformance. Now, you have a scale, you say a quarter inch to one foot. That is a common scale, very common scale.

Mr. Arnell: Well, if your Honor please, that would take at least an hour and I certainly am not qualified to compare these with any of the official plans and I think if the witness is to refer in his testimony to any documents he should refer to the official exhibits and official documents under which this contract was to be performed, and, as I point

(Testimony of Edward Collins.)

out again, your Honor, there is no identity between this proposed Exhibit Q-1 and 384.

The Court: Well, I point out to counsel that this [647-25] witness has testified that these were taken from the plans now in evidence.

Mr. Arnell: That is true, your Honor, but he stated also that he did not draw these prints or diagrams or anything else. Someone else did it and I think that, again, your Honor, that that makes it inadmissible.

The Court: But he did do this: He stated that the day before yesterday he checked it with the plans and did find that they were the same, more or less, schematic or lay-out plans as set forth in the original plans now in evidence. Is that not true?

A. Yes.

The Court: For the reason that it's illustrative of the evidence and the position of the defendants case, the objection will be overruled. They may be admitted and marked Defendants Exhibit Q.

Q. (By Mr. Olwell): During the late spring and summer of 1953 did you have occasion to observe the application of the sheetrock at Ladd?

A. Yes.

Q. State just what your normal day up there would have been? In other words, were you on the job or off the job or where were you?

A. I was on the job most of the time in the office.

(Testimony of Edward Collins.)

Q. And on many occasions were you out on the project? [647-26] A. Yes, sir.

Q. Infrequently or frequently?

A. Frequently.

Q. Now, do you consider yourself as an expert qualified to pass on sheetrock application?

A. No.

Q. Did you observe the taping? A. Yes.

Q. How did the taping look to you from observing it at 384?

Mr. Arnell: If your Honor please, I object to that question upon the ground it calls for a conclusion of the witness. Counsel can ask him what he observed or what he saw, as far as the taping is concerned.

Mr. Olwell: If your Honor please, the question was poorly phrased and I apologize.

Q. (By Mr. Olwell): Just tell me what you saw?

The Court: The court need not rule.

Q. Just tell me what you saw of the taping?

A. The taping was not too good in my opinion. It had——

Mr. Olwell: Just hold up, Mr. Collins, please.

Mr. Arnell: If your Honor please, I move the answer be stricken upon the ground the witness stated a conclusion and opinion.

The Court: Motion is granted. [647-27]

Q. (By Mr. Olwell): Just tell us what you saw.

A. I saw seams. I saw tape that was not cov-

(Testimony of Edward Collins.)

ered. I saw ridges. I saw places where there may have been too much tape, places where there may have not been enough—spackle, I beg your pardon.

Mr. Arnell: I move that that answer be stricken upon the ground he stated an opinion, too much tape and too much spackle, not enough.

The Court: The latter part of the question may be stricken where he refers to too much or too little. He has testified he is not qualified or an expert in the field of taping or spackling.

Mr. Olwell: Your Honor, he has not as yet, but I intend to have him so testify. Is it not true, Mr. Collins, you are not qualified?

A. No, sir.

The Court: But he testified to a question you asked him a little while ago, are you an expert?

Mr. Olwell: That was on sheetrock.

The Court: I beg your pardon.

Mr. Olwell: I am in this position. I am identifying the witness as not an expert.

The Court: Yes; I thought the records showed it. [647-28]

Q. (By Mr. Olwell): During the course of the summer of '53 and the fall of '53, Mr. Collins, did you have any occasion to observe the painting that went on? A. Yes.

Q. What did you observe? What did you see regarding paint?

A. I saw the paint applied to the walls. I saw it applied to the ceilings. I saw on the woodwork there were runs, on the walls there were holidays.

(Testimony of Edward Collins.)

Q. Did you ever discuss the paint or any matter relating to paint with Mr. Soby?

A. I don't understand the question.

Q. Did you ever discuss the painting with Mr. Soby?

A. I probably discussed it with him, yes.

Q. Did you ever have occasion to be present at an inspection concerning painting? A. Yes.

The Court: Counsel, could we take a recess for a few moments? We have been in session since 1:30 solid. The court will stand in recess for a period of 10 minutes.

(Whereupon, at 3:20 o'clock p.m., following a 10-minute recess, court reconvened and the following proceedings were had.)

Q. (By Mr. Olwell): Mr. Collins, do you recall a specific date of the inspection to which you referred just prior to the recess concerning [647-29] painting when Mr. Soby was present?

A. October 22, 1953.

Q. 1953? A. Yes.

Q. Now, prior to that time, in the late summer and fall of '53, had you ever discussed the painting or the painting problems with Mr. Soby?

A. Yes.

Q. Just tell in your own words what the discussion was with him?

A. Well, we didn't feel that the——

Mr. Arnell: If your Honor please, before the

(Testimony of Edward Collins.)

witness testifies, may he specify the dates and places?

The Court: Yes. Objection sustained.

Q. (By Mr. Olwell): If you can, Mr. Collins, let's pin this down as much as we can to dates and places and who was present. If you are unable to state the exact date, state the approximate time to the best of your ability.

A. I don't know the exact date. It was prior to October 22, and Mr. Soby and Harold Stenson, our general superintendent, and Eugene Henrikson, our job superintendent, and myself, talked with Mr. Soby about his work.

Q. And what did he say?

A. He said that he had seen work in Anchorage that was—excuse me—at Fairbanks was as good as the work he had seen at [647-30] Anchorage and also they were building some 8-family quarters at Eielson Air Force Base and he said the work down there was no better than his work at Ladd Air Force Base.

Q. What, if anything, did you or Mr. Soby do?

A. We went down to Eielson Air Force Base and looked over another contractor's project.

Q. Who was along, do you remember?

A. Mr. Soby, Mr. Stenson, I think Mr. Henrikson, and myself.

Q. And what was said down there between you people and Mr. Soby?

A. We didn't think that the quality of work on our contract at Ladd was as good as the one at

(Testimony of Edward Collins.)

Eielson, however, Mr. Soby said he was assured that his work would pass and requested that we get an inspection.

Q. Excuse me. Go ahead.

A. That we would—he asked for an inspection and he was sure that the inspector would pass his work.

Mr. Arnell: If your Honor please, now I'd like to move that the answer be stricken upon the ground that it's not responsive to the question asked.

Mr. Olwell: May it please the court, I think it's directly responsive.

The Court: As I recall it, Mr. Arnell, he is testifying as to what was said in the presence of Mr. Soby, therefore, objection will have to be [647-31] overruled.

Q. (By Mr. Olwell): Was it thereafter that this inspection of October 22 took place? A. Yes.

Q. Now, what happened at that inspection, Mr. Collins?

A. The Corps—two representatives of the Corps of Engineers were there, Mr. Soby, I think Mr. Carlson, Mr. Soby's superintendent; Mr. Stenson, Mr. Henrikson, and myself from the Kuney-Johnson Company were there.

Q. And tell us what happened there?

A. The Captain or the Major—Conlin is his name—of the Corps of Engineers told us and told Mr. Soby that this particular building that he was looking at was not to the satisfaction of the Corps

(Testimony of Edward Collins.)

of Engineers and there'd have to be work done on it to make it satisfactory.

Q. And was anything agreed upon at that time?

A. It was agreed at that time that we would personally try to supervise the work to see that we could get a building acceptable by the Corps of Engineers.

Q. Was any plan discussed at that time with Mr. Soby and Mr. Carlson concerning the manner in which the work would proceed?

A. Yes. I believe, after the members of the Corps of Engineers left, Mr. Soby, and Mr. Carlson and Mr. Stenson and Henrikson and myself tried to lay out a pattern that we should follow and it was agreed that we would concentrate on one building [647-32] at a time, in the first apartment, say, try to whip that out so that it would be satisfactory to the Corps and then move to the next one and so on down the line, so we would definitely have the work done to their satisfaction; not that we would put in 20 or 30 painters in one building, but we would try to improve on what was done.

Q. Was that plan followed out?

A. It was for a few hours of the following day, I believe.

Q. And what happened after that, of which you have personal knowledge, Mr. Collins, not what someone told you?

A. The job superintendent, Henrikson, came into the office along with Mr. Carlson and said that he

(Testimony of Edward Collins.)

wanted Carlson removed because the plan that we had decided upon yesterday was not being fulfilled.

Q. Did he explain that?

A. He said that at the beginning of the day—whether it's 8:00 o'clock in the morning, I don't remember—Mr. Carlson started to put the painters in to do the repair work, so to speak, and around 11:00 o'clock or prior to noon he went to check on them again and they were scattered in various locations.

Q. What, if anything, did Mr. Carlson say?

A. He didn't say anything.

Q. And what took place after Mr. Henrikson's explanation?

A. Mr. Stenson, the general superintendent, was consulted and a [647-33] letter was written to Mr. Soby in regards to the removing of Mr. Carlson.

Mr. Olwell: May I approach your clerk, your Honor?

The Court: You may.

Mr. Olwell: May I have Plaintiff's Exhibit 39? May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Olwell): Handing you what has been admitted in evidence as Plaintiff's Exhibit 39, I will ask you if that is the letter to which you refer?

A. Yes; it is.

Q. And who signed that letter? A. I did.

Q. Did you ever receive a reply to it?

A. No, sir.

(Testimony of Edward Collins.)

Q. Did you ever discuss that letter after it was written with either Mr. Carlson or Mr. Soby?

A. No, sir.

Q. Did you ever have occasion during the course of the fall of 1953 to have any personal conversation with Mr. Carlson prior to October 23 concerning the painting supervision or any problems of his?

A. Yes; I did. I don't recall the date.

Q. Do you recall where it was that this conversation took place? [647-34]

A. It was on 384 Contract between the buildings.

Q. And just who was present?

A. Just Mr. Carlson and myself.

Q. And just what took place, what was said?

A. Mr. Carlson was very unhappy about the whole situation and he said he can't have the painters do this and can't make the painters do that and he was very unhappy and I just, well, patted him on the back and that was about all.

Q. Now, Mr. Collins, on the job at 384 what, if anything, did you have to do with making any payments to Mr. Soby?

A. Mr. Soby would bring in his payment request and I would okay it and give it to the office manager.

Q. And do you recall whether there was any—strike that, please. I will start over. In what form were those payment requests?

A. I imagine they were in the form of a letter. I don't remember.

Q. Well, my question was whether or not it was

(Testimony of Edward Collins.)

a request for progress payment? A. Yes.

Q. Was that arrangement ever changed, that is, a progress payment?

A. Yes; it was. At one time, I believe, I authorized the payment to Mr. Soby not on a progress payment.

Q. Can you state whether or not at any time during the job you issued checks to cover his payroll?

A. I did not issue the checks. They [647-35] were issued.

Q. Did you authorize that?

A. No; I did not authorize payroll to meet his payrolls.

Q. Do you know who did?

A. I think it was a representative of the bonding company.

Q. Well, what I mean, as far as the issuance of the check itself by Kuney-Johnson, did you authorize that issuance of the actual drawing of the check?

A. I did.

Q. Yes? A. No; I did not.

Q. Who in behalf of Kuney-Johnson did?

A. Mr. Barkley.

Q. Now, there has been some conversation here in your testimony, Mr. Collins, concerning the progress estimates that Kuney-Johnson put into the Government. Can you just state in your own words how that was handled, 384?

A. We did not put in progress estimates on 384

(Testimony of Edward Collins.)

to the Government. The Government made them out themselves.

Mr. Olwell: May I have an exhibit, your Honor?

The Court: You may.

Mr. Olwell: I can get it faster than I can ask the clerk.

The Court: Very well.

Mr. Olwell: If your Honor please, this is one of the exhibits to which I was referring that has come apart.

The Court: What I'd suggest—— [647-36]

Mr. Olwell: I don't know whether it can be stapled. You can see how it's fastened.

The Court: I'd suggest that you staple it. The Clerk of the Court has a large stapling machine.

Mr. Olwell: My only fear is one of these times it's going to get dropped and then we might be in trouble. Does your Honor wish me to staple them now or——

The Court: No. Will you get the staple machine, Mr. Johnson?

Mr. Olwell: May I approach the witness?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you Plaintiff's Exhibit 37, which appears to have a number after it, 58, probably marked page 58. You say the Government made out something itself. Can you refer to that exhibit and clarify that statement as to which part of it you mean?

A. We didn't make it out. We didn't make out any portion of it.

(Testimony of Edward Collins.)

Q. Now, turning to the larger sheets which are on the bottom and which contain breakdowns as to the portion of the project involved. Calling your attention to building closure, interior finish, plumbing fixtures, heating, electrical, and so forth, by apartment numbers. A. Uh-huh.

Q. What is included in the term "interior finish"? [647-37]

Mr. Arnell: If your Honor please, I object to that upon the ground it calls for a conclusion of the witness.

Mr. Olwell: I will ask a preliminary question, Your Honor. I will withdraw that.

Q. (By Mr. Olwell): Mr. Collins, do you know what is included in that term "interior finish"?

A. Yes.

Q. Will you state, please, what is so included?

A. Interior finish on this particular project would be—it would mean the hardwood floors, the door frames, the doors, the millwork, trim, kitchen cabinets, floors and wall covering, and painting, finish hardware, and possibly bathroom accessories, but I am not too sure.

Q. Mr. Collins, do you know what per cent of the total project was involved in the interior finish, percentage-wise? A. It's shown—

Mr. Arnell: I object to that upon the ground it calls for a conclusion of the witness. No foundation has been laid to qualify him as an expert.

Mr. Olwell: I will withdraw the question in the interest of time.

(Testimony of Edward Collins.)

Q. (By Mr. Olwell): Mr. Collins, referring to the exhibit that you have in front of you, I believe it's Exhibit 37. Is the percentage of [647-38] interior finish as against the entire project shown on that exhibit? A. Yes, sir.

Q. What is that percentage?

A. 20 point 25.

Q. And have you had occasion to compute dollarwise the amount of money involved in interior finish? A. Yes.

Q. Approximately what is that figure?

A. Four hundred and thirty-six thousand some odd dollars.

Q. Now, Mr. Collins, at any time during the progress of the painting work, let's say from very early in July, 1953, until December 19, 1953, did Mr. Soby ever complain to you personally about popped nails? A. No.

Q. Did he ever complain to you about any sag in the ceilings or sheetrock? A. No.

Q. Did Mr. Soby ever discuss with you personally any extras to which he thought he was entitled?

A. Yes.

Q. In what respect? Just tell us what extras he discussed.

A. The extras that he discussed was for additional spackle work around metal door frames, repairing the ceiling of buildings one, two and three, I believe, extra spackle on that and the [647-39] painting, the extra spackle work around the elec-

(Testimony of Edward Collins.)

trical outlet boxes. I think we moved a door that had already been in place and he was—that was an extra. In the bathrooms the escutcheon plate for the sink drain would not cover the hole that was made in the plasterboard and he had to have extra spackle for that.

Mr. Olwell: May I approach the witness, Your Honor?

The Court: You may.

Q. Mr. Collins, handing you what has been admitted in evidence as Defendant's Exhibit K. What is that, please?

A. Statement of extra work done for Kuney-Johnson Company.

Q. Was that handed to you by Mr. Soby?

A. Yes.

Q. Does that cover the matters that you just testified to that he discussed with you that he claimed for extras?

A. There is a couple of other items here, too, that I didn't remember.

Q. Now, let me ask you this: Did Mr. Soby ever present any other claim to you other than as shown on Exhibit K? A. No.

Q. And when he brought that letter in to you what, if anything, took place?

A. When Mr. Soby brought this in to me his figure was for \$4,480.00 under the title "Labor and Material, Contract 384," in his invoice, and we arrived at an hourly rate for the [647-40] various

(Testimony of Edward Collins.)

items that he listed in here. We discussed it and some of it was due to spackling. The price that the spackler had, Mr. Soby said was too high, and together, possibly with Mr. Henrikson, we arrived at the price in ink in this letter.

Mr. Olwell: If your honor please, your clerk stepped out. May I see if I can find Exhibit F?

The Court: Yes, you may do so.

Mr. Olwell: May I approach the witness, Your Honor?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you subdivision A of Defendant's Exhibit F, and calling your attention to the second sheet, do the figures as shown on that sheet have any relation to the total figure, \$3,536.00 odd dollars as shown on Exhibit K?

A. Yes, sir.

Q. What relationship do they have?

A. The figure \$3,536.00 is the same as the \$3,536.00 on this Exhibit K.

Q. And what is shown on subdivision A of Exhibit F?

A. It is a breakdown of the various extra work that Mr. Soby performed under this contract.

Q. You mean under the claim of Exhibit K?

A. Yes.

Q. Mr. Collins, will you look at the bottom of Exhibit K. There [647-41] is an additional item added there. A. Yes.

Q. Will you tell the court what took place concerning that?

(Testimony of Edward Collins.)

A. At the time that Mr. Soby presented his bill, he had also painted the clothesline poles in the basement of these apartments and we just added it to this bill.

Q. Turn that over, please, to the back side. Whose writing appears there?

A. That is my writing.

Q. And what does that relate to?

A. Mr. Soby did extra work for the plumber. He painted the piping in the basement for the plumber and also he painted some of the piping in the utilidors for the plumber, Urban Plumbing and Heating Company. Also Mr. Soby painted the convectors in each of the apartments and when the plumbers came in to make their final test, would kick them or damage them and so Mr. Soby had to go back and paint those again. Then we used the structural steel beam in the basement to hold up the first floor joists and we—there was an option to the contract, we used it. It was not included in Mr. Soby's price, and I have a figure here of \$904.40 for that painting. Also we used pre-finished kitchen cabinets on that job and these were finished in the states and sent up but they received damage and Mr. Soby, we asked him to do that work and I have a price of \$1,092.00, approximately. Now, whether [647-42] it was an estimate, I don't know.

Q. Do you recall whether or not that general subject, as shown on the back of Exhibit K, was discussed with Mr. Soby at the time he brought in the letter which is now Exhibit K?

(Testimony of Edward Collins.)

A. I don't know if it was or not. I really don't know.

Q. And it relates, I think you said, all to the Urban Plumbing and Heating matter?

A. No. The first item up here is for Urban, but the other ones are for work that he would do for us.

Q. I see. Now, Mr. Collins, do you recall the occasion when Mr. Douglas, Consulting Engineer for the U.S.F. & G., came to Ladd and looked over the Ladd project? A. Yes.

Q. Do you remember approximately when it was?

A. I think it was some time in December, but I don't know for sure.

Q. Did you have occasion at that time to go around the project with Mr. Douglas?

A. Yes.

Q. What did the two of you do?

A. There was Mr. Henrikson and Mr. Stenson and Mr. Douglas and myself. We were not alone.

Q. What did you do, Mr. Collins?

A. We went and looked at several apartments in the project.

Q. And what, if anything, did Mr. Douglas say to you? [647-43]

Mr. Arnell: I object to that upon the ground it's beyond the issues of the pleadings. There is no allegation here that Mr. Douglas had any authority or any right to bind the bonding company. This is an action that is based entirely on the provisions of the Miller Act. I, therefore, think that the question

(Testimony of Edward Collins.)

and the answer is incompetent, irrelevant and immaterial.

The Court: Well, but, counsel, didn't Mr. Douglas testify that he was instructed by the principal, United States Guaranty, to come up and make an inspection of this building?

Mr. Arnell: That is no proof, Your Honor, that he had any authority. He made two visits.

Mr. Olwell: If the court please, my memory could be mistaken as to exact dates, but my recollection is that at the pretrial conference in this case on the 21st of September, and I believe it was incorporated in the pretrial order, but, in any event, at the pretrial conference, counsel and I stipulated that Mr. Murray and Mr. Douglas had authority to act for the additional defendants.

Mr. Arnell: No, that is not so stipulated, Your Honor, and I ask the court to examine the pretrial order to verify the statement.

Mr. Olwell: I do not recall definitely whether it's contained in the order, but I distinctly recall the question because the question came up regarding correspondence and the only stipulation the defendants made, they objected to a man by the name of Beeson [647-44] at the time, but did agree Mr. Douglas and Mr. Murray had authority.

Mr. Arnell: We made no such stipulation.

The Court: I don't recall that, Mr. Olwell.

Mr. Olwell: I beg your pardon?

The Court: I don't recall that. They agreed

(Testimony of Edward Collins.)

quite the contrary. I think they took the position that Mr. Douglas could not, but then that is——

Mr. Olwell: I think that is immaterial, but that was my recollection of that aspect and Mr. Douglas testified in this case as to what he saw and described it. Now, certainly, I am entitled from this witness to tell how Mr. Douglas described the situation as he then saw it to Mr. Collins.

The Court: I think that Mr. Olwell is right. Mr. Arnell, therefore, objection will have to be overruled.

Q. (By Mr. Olwell): What did Mr. Douglas say about the situation that you and he and Mr. Stenson, Mr. Henrikson observed on this occasion to which you refer?

Mr. Arnell: If your honor please, I object to the question unless the witness testifies that Mr. Soby was there. Now, we have two facets to this problem: One is U.S.F. & G. and the other is the plaintiff in this action, and the answer might be admissible as against one, but not the other.

The Court: Well, but, counsel—— [647-45]

Mr. Olwell: May it please the court, Mr. Douglas was put on as a witness in Plaintiff's case.

Mr. Arnell: That is quite true, Your Honor, but his testimony did not go to the field that this witness is asked to testify about. Mr. Douglas testified what he saw and what he observed at the jobsite and the condition of the walls and the wallboard, etc.

The Court: Well, objection will have to be over-

(Testimony of Edward Collins.)

ruled because Plaintiff called Mr. Douglas as part of his case.

Q. (By Mr. Olwell): Do you remember the question, Mr. Collins? A. Yes.

Q. Answer it, please.

A. Mr. Douglas told us that it was a very poor job and he didn't doubt that the Government would reject the buildings that we had asked for inspection.

Q. And thereafter what did Mr. Douglas do?

A. Mr. Douglas was in Fairbanks, I believe, for two or three days and he came into the office and talked to Mr. Barkley.

Q. Were you present?

A. Some of the time, yes, I was.

Q. Did you hear any portion of the conversation? A. Yes.

Q. What did you hear of the conversation?

Mr. Arnell: If your honor please, on behalf of the [647-46] Plaintiff, at least, I would object again and renew my objection to this testimony unless it is shown that the Plaintiff was present.

The Court: Well, for the record who was present, Mr. Collins?

A. Mr. Barkley, Mr. Stenson, possibly Mr. Henrikson, and myself.

The Court: Objection is overruled. He may answer.

Q. (By Mr. Olwell): What did you hear, Mr. Collins, of the conversation?

(Testimony of Edward Collins.)

A. Mr. Douglas told Mr. Barkley that they would pay the payroll to do the work and——

Mr. Arnell: If your honor please, may the record show a continuing objection?

The Court: It may.

Q. (By Mr. Olwell): Now, Mr. Collins, I think you said that you were not present during all of the time the Larson Brothers worked on the job?

A. No, I was not.

Q. There has been testimony in this case, Mr. Collins, that in late August and/or early September of 1953 there was a general conference or discussion concerning the sheetrock and nails at which you and Mr. Stenson, Mr. Bottoroff, some others, Mr. Carlson probably, were present, and in which Mr. Stenson is alleged to have made statements concerning payments for extra work to be done by Soby Painting Company. Mr. Collins, [647-47] at any time in your presence did Mr. Stenson ever promise Mr. Carlson, Mr. Soby, or any representative of the Soby Painting Company or its subcontractor, Bottoroff, that extra work would be paid for?

Mr. Arnell: If your honor please, I'd interpose an objection upon the ground, first, the question is leading, and, second, there has been no foundation laid for it.

The Court: Objection sustained. You may testify as to what was said.

Q. (By Mr. Olwell): Do you recall any such conversation concerning extras?

(Testimony of Edward Collins.)

Mr. Arnell: I renew my objection, Your Honor, upon the ground that there has been no foundation laid.

Mr. Olwell: May it please the court——

Mr. Arnell: And this question that has been asked, Your Honor, is based upon the leading references in the prior question to assist this witness to arrive at an answer and I object to it upon that ground.

Mr. Olwell: May it please the court, I'd like to be heard on that.

The Court: Just a moment. There was testimony during the course of the trial that Mr. Stenson is supposed to have promised the Plaintiff, Mr. Soby, that he would see that he was paid for the extras. Now, this is part of the Defendant's case at the present time and they have, of course, certainly the right [647-48] to put on any proof that they might have as to conversations concerning that subject.

Mr. Arnell: Well, if your honor please, I certainly would confess that, however, I think that in an effort to do that counsel has not—does not have the right to ask leading questions.

The Court: Well, that, I concur. That is why I sustained your former objection and counsel, of course, has the right now to refer to any conversation that was had between Mr. Stenson and Mr. Soby concerning this subject.

Mr. Olwell: May it please the court, this thing comes up entirely as a matter of refuting and an-

(Testimony of Edward Collins.)

swering prior testimony. Now it strikes me that it's entirely proper to state to a witness the testimony was thus and so, you were alleged to be present. Did you hear that conversation. Now, to ask the witness what took place, the witness might state that he wasn't even present and he doesn't even remember such a conversation. I think I am entitled to ask him, was this statement made in your presence.

The Court: No, the court doesn't take that position, counsel. You may ask him what the conversation was and then if the witness does not remember and you know that conversation did center around a particular subject, then you may ask a suggestive question on the particular subject you allude to, but you mustn't put words in the mouth of the witness as to what was said until such time as it has been determined that he doesn't know what you are getting at. There is nothing gained by the ruling of the [647-49] court on the admissibility of evidence, but we are endeavoring to get voluntary and free statements of the witness so the court will have the most probative evidence possible to determine the issues in this case.

Mr. Olwell: I appreciate that.

The Court: And by your suggesting the answer, then that is not free and voluntary.

Mr. Olwell: I appreciate that. I had not intended to argue. I did not intend to suggest the answer. I merely intended to ask the witness if this was said. He can say yes, he can say no. That

(Testimony of Edward Collins.)

does not suggest an answer. He could say, yes, it was said, or he could say no, it's not.

The Court: I think the court has ruled that the objection should be sustained because it is leading and I have also suggested to you how you may conduct yourself thereafter, if by chance the witness does not recall the conversation that was had.

Now, may I interrupt you, please, since we are interrupted now on this problem. We have the matter of continuing at 4:00 o'clock. I would like to take a recess for a few moments now and excuse counsel. Counsel, I'd like to go into this other problem we have pending before us, so the trial of this case will be continued until the call of the gavel and the court will go into recess for a period of five minutes.

(Thereupon, at 4:15 o'clock p.m., following a [647-50] five-minute recess, court reconvened, and after hearing a matter not pertaining to this case, the following proceedings were had:)

The Court: You may proceed then.

Q. (By Mr. Olwell): Mr. Collins, do you recall any discussion, meeting, or conference in the latter part of August or the first part of September, 1953, at which Mr. Bottoroff, Mr. Carlson, Mr. Stenson, Mr. Soby were present when any matters were discussed relative the sheetrock or anything else?

Mr. Arnell: If your honor please, I would object to that again upon the ground that it's a leading question.

(Testimony of Edward Collins.)

The Court: Objection overruled. He may answer.

Q. (By Mr. Olwell): Do you recall any such conference, discussion or meeting?

A. No, I am sorry, I don't recall.

Q. Do you recall any specific conference or meeting in June of 1953, referring particularly to the latter part, concerning sheetrock when Mr. Stenson and Mr. Henrikson, you and Mr. Bottoroff and Mr. Carlson were present? Do you recall any specific conference, meeting on that subject?

A. No.

Q. Do you recall discussing with Mr. Soby the number of tapers to be sent to the Ladd job, which discussion could have taken place shortly before the taping started on the job? [647-51]

A. Tapers?

Q. Yes. A. No.

Q. Will you state whether or not at any time you directed Mr. Soby or requested him to bring any specific number of tapers to the job?

A. No, sir.

Mr. Olwell: You may examine. I tender the witness for cross-examination.

The Court: Very well.

EDWARD COLLINS

testifies as follows on

Cross-Examination

By Mr. Arnell:

* * *

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of
the above-entitled Court, hereby certify:

That the foregoing pages 647-1 through 647-53
is a true and correct transcript of excerpt of pro-
ceedings on the trial of the above-entitled action,
taken by me in stenograph in open court at Anchor-
age, Alaska, on October 11, 1956, and thereafter
transcribed by me.

/s/ BONNIE T. BRICK.

EDWARD COLLINS

testifies as follows on:

Redirect Examination

Mr. Olwell: Your Honor, may I approach the
witness and hand him an exhibit, please?

The Court: You may.

By Mr. Olwell:

Q. Mr. Collins, counsel inquired of you as to the
amount of hours necessary on the ceiling work by
reason of the insulation having to be replaced in
Buildings 1 and 2, a portion of which was shown
in Exhibit K. Now, I have handed you Plaintiff's
Exhibit 33, subdivision 1, and call your attention to
the itemization of the total amount of \$3,556.00
shown on Exhibit K. Will you look at the first item

(Testimony of Edward Collins.)

on that sheet and just state for the record the number of hours involved in these totals after that rework was done?

Mr. Arnell: I object to that upon the ground it is repetitive. The document speaks for itself. As I recall his answer on cross, he did not know, and I was testing only his recollection. The document is in evidence and that is the best evidence, Your Honor.

The Court: Mr. Olwell, doesn't the exhibit speak for itself?

Mr. Olwell: If your honor please, I concede the [695-1] exhibit speaks for itself, but counsel inquired at some length the number of hours and this is one item contained in that and for the record I just wanted him to state the number of hours. I won't pursue it any further.

The Court: That being the case, you may state the number of hours.

A. One hundred and sixty-four hours.

Mr. Olwell: I have no further questions of this witness, your honor.

The Court: Very well.

Mr. Arnell: I haven't any either.

The Court: Very well. You may step down.

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the
above-entitled Court, hereby certify:

That the foregoing pages 695-1 and 695-2 is a
true and correct transcript of excerpt of proceedings
on the trial of the above-entitled action, taken
by me in stenograph in open court at Anchorage,
Alaska, on October 15, 1956, and thereafter trans-
cribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed February 19, 1959.

[Endorsed]: No. 15823. United States Court of
Appeals for the Ninth Circuit. Eric Soby, Doing
Business as Soby Painting Co., et al., Appellants,
vs. Lloyd W. Johnson and Max J. Kuney, etc.,
Appellee. Supplemental Transcript of Record. Ap-
peal from the District Court for the District of
Alaska, Third Division.

Filed: March 2, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

